# WISCONSIN INDIAN CHILD WELFARE ACT (WICWA) WEBINAR

November 21, 2024

**Please note that the information contained in this presentation is <u>not</u> meant to be construed as legal advice.**

**Any guidance provided should not override a judge's decision and authority.**

**Questions are welcome; however, the presenters are unable to provide input on individual cases.**

**Thank you!**

## Continuing Education Credits

**Circuit Court Judges & Commissioners – 0.5 credits**

- **CCIP will send list of those attending live webinar to Office of Judicial Education.**
- **If watching recording, contact ccip@wicourts.gov for Certificate of Attendance.**

**Attorneys – 1.5 credits**

- **Applied CLE credits, including GAL-Minor.**
- **Search under "Live Webcast" for location.**

**Social Workers – 1.5 hours**

- **Continuing education hours may be claimed by the individual participant by entering them as an external training in PDS Online.**

## PowerPoint & Materials

https://wicciptraining.com/Resources

Under Training Materials – Webinars
(on the bottom of the list)

# Introductions

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# Background

# ICWA and WICWA

| Indian Child Welfare Act (ICWA) | Wisconsin Indian Child Welfare Act (WICWA) | ICWA Regulations |
|---|---|---|
| Federal Law | Codified into State Statutes | Legally-binding guidance |
| Enacted in 1978 | Enacted 2009 | Effective December 12, 2016 |

# Purpose

- Intended to protect the best interests of Indian children and promote the stability and security of Indian tribes and families.
- "In Indian child custody proceedings, the best interests of the Indian child shall be determined in accordance with the federal Indian Child Welfare Act, 25 USC 1901 to 1963, and the policy specified in this subsection."

  - § 48.01(2)

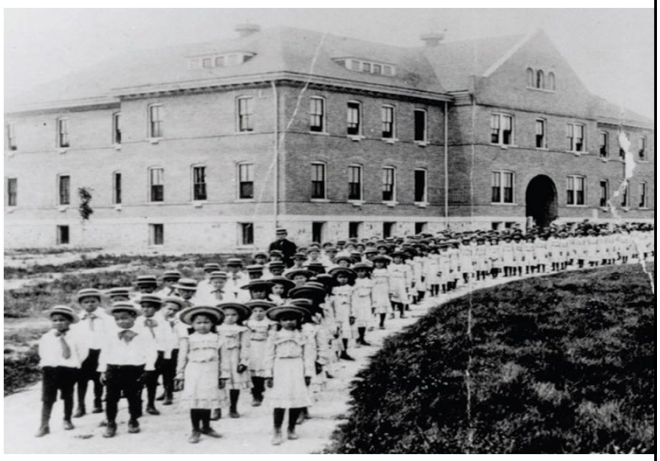
# History: Boarding Schools

Part of federal policy in the late 19th and early 20th centuries.

Intended to assimilate Native youth: “Kill the Indian in him, and save the man.“

Stripped Native American children of their language, culture, and customs.

In October 2024, President Biden issued formal apology.





**Winnebago Indian School Neillsville, WI (1921-1957)**

There were at least 14 boarding schools in Wisconsin.

# History: Pre-ICWA Data

- Studies in 1969 and 1974 showed that 25% to 35% of all Indian children had been separated from their families and placed in foster care or institutions or with adoptive families.
  - 85% of all Indian children in foster homes were in non-Indian homes.
  - Only 1% were removed because of abuse. The rest: "neglect" or "social deprivation."

# Disproportionality in Child Welfare Proceedings

| Disproportionate Foster Care of AI/AN Children: 15 States with the Highest Rates[3] | | | |
|---|---|---|---|
| State | Disproportionality Rate (2019) | % of children who are AI/AN | % of children in foster care who are AI/AN |
| Minnesota | 14.99 | 1.7% | 25.8% |
| Wisconsin | 5.87 | 1.3% | 7.7% |
| North Dakota | 5.16 | 8.5% | 43.7% |
| South Dakota | 4.52 | 13.7% | 62.1% |
| Nebraska | 4.16 | 1.3% | 5.3% |
| Iowa | 4.14 | 0.4% | 1.8% |
| Montana | 3.45 | 10.6% | 36.7% |
| Washington | 3.16 | 1.8% | 5.6% |
| Hawaii | 3.02 | 0.2% | 0.6% |
| Oregon | 2.98 | 1.6% | 4.7% |
| Alaska | 2.65 | 21.6% | 57.3% |
| Utah | 2.26 | 1.1% | 2.4% |
| North Carolina | 1.74 | 1.3% | 2.3% |
| California | 1.52 | 0.5% | 0.8% |
| Maine | 1.41 | 1.1% | 1.5% |

See also Racial & Ethnic Disparity Dashboard (state and county data): https://dcf.wisconsin.gov/family-first/data-dashboard

# Applicability

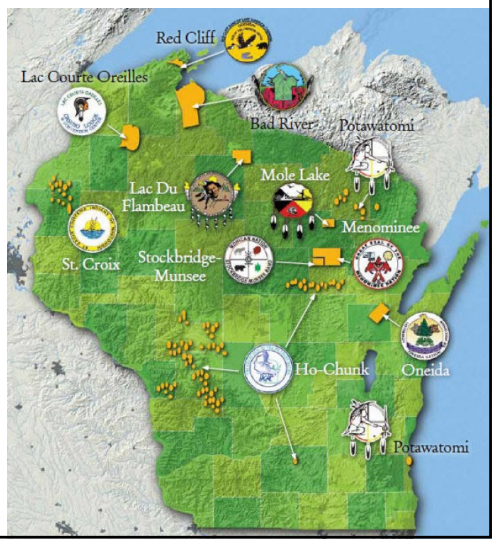
1. **Does the case involve an Indian child?**
2. **Is it an Indian Child Custody Proceeding?**

## Indian Child

- Indian child: Any unmarried person who is under the age of eighteen and is affiliated with a federally recognized Tribe in either of the following ways:
  - As a member of a Tribe, OR
  - As a person who is eligible for membership in a Tribe and is the biological child of a member of a Tribe.
- § 48.02(8g)

# Federally Recognized Tribes in Wisconsin

- Bad River Band of Lake Superior Chippewa
- Forest County Potawatomi Community
- Ho-Chunk Nation
- Lac Courte Oreilles Band of Lake Superior Chippewa
- Lac du Flambeau Band of Lake Superior Chippewa
- Menominee Indian Tribe of Wisconsin
- Oneida Nation
- Red Cliff Band of Lake Superior Chippewa
- Sokaogon Chippewa
- St. Croix Chippewa Indians of Wisconsin
- Stockbridge-Munsee Band of Mohicans




# Tribal Membership

- Indian tribes have the inherent authority to determine their membership.
  - *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)
- Membership criteria differ from tribe-to-tribe.
- Tribal membership is a political status NOT a racial or ethnic designation.

## Indian Child Custody Proceeding

"Indian child custody proceeding" includes:

- A preadoptive placement
- An out-of-home care placement
- Termination of parental rights
- An adoptive placement

It does NOT include:

- Delinquency cases
- Divorce/paternity cases (normally)

## Out-of-Home Care Placement

- CHIPS
- JIPS
  - Uncontrollable
  - Habitually truant from school
  - School dropout
  - Habitually truant from home
- Guardianships
  - § 48.977 & § 48.9795 (formerly Chapter 54)
- Foster care placement in family cases

## In-Home Cases

- WICWA findings not explicitly required for in-home cases.
- Active efforts still need to be made by the county agency to prevent future removal.
- Definition of “Indian child custody proceeding” under WICWA includes a proceeding where an out-of-home placement “may occur” - § 48.028(2)(d)
  - Registered mail notice still required for any subsequent in-home to out-of-home change in placement, even if provided previously.

## Inquiry

# Court Inquiry in Every Case

In all emergency, voluntary, and involuntary custody proceedings, the court must:

1. Ask each case participant whether they know or have reason to know child is an Indian child, and
2. Instruct parties to inform the court if they subsequently receive information of reason to know Indian child.

Language included on TPC Order (JD-1711), CHIPS Dispositional Order (JC-1611), JIPS Dispositional Order (JD-1746), TPR Orders (JC-1638 & JC-1639), Guardianship Order (JG-1606), and Adoption Order (JC-1647).

# Reason to Know

- Under ICWA regulations, the court has "reason to know" that the case involves an Indian child if **any** of the following:
  - Any participant informs the court that child is an Indian child.
  - Any participant informs the court that they discovered information indicating that the child is an Indian child.
  - Child gives the court reason to know he/she is an Indian child.
  - The court is informed that domicile or residence of the child, a parent, or Indian custodian is on a reservation.
  - The court is informed the child is/has been a ward of Tribal court.
  - The court is informed that either parent or child possesses an identification card indicating membership in a tribe.

# Applicability

If reason to know the case involves an Indian child, but court lacks sufficient information to determine whether child is an Indian child:

- Additional steps required, including confirming that agency used due diligence to identify and work with all possible tribes.
- Court and agency must treat as an Indian child until determined on the record that the child is **not** an Indian child.

# Identification Tools

DCF forms available (in eWiSACWIS):

- Screening for Child's Status as Indian
  - Should be created for all children.
- Child's Biological Family History
- Request for Confirmation of Child's Indian Status

- See also WICWA Desk Aid & WICWA eWiSACWIS Desk Aid
  - https://dcf.wisconsin.gov/wicwa

## WICWA Circuit Court Forms

WICWA circuit court forms should be used:
www.wicourts.gov/forms1/circuit/formcategory.jsp?Category=21

- They contain the required information, advisements, and findings.
- Intended for out-of-home placements in CHIPS & JIPS cases.
  - If active efforts finding requested, use “Other” section on the order.

## Notice & Intervention

# Initial Notice

- First notice to the Indian child's parents, Indian custodian, and tribe in a proceeding must be by registered mail, return receipt requested.
  - Must be received at least 10 days prior to the first hearing (excluding TPC Hearings).
- **The return receipts must be filed with the court.**
- If identity or location of parent or tribe cannot be determined, this initial notice must be sent to the Bureau of Indian Affairs (BIA) Midwest Regional Office via registered mail.
  - Must be received at least 15 days prior to the first hearing (excluding TPC Hearings).

# Subsequent Notice to Tribe

- Notice of subsequent hearings must be sent in writing by one of the following ways - § 48.028(4)(a):
  - Mail
  - Personal service
  - Fax
  - **NOT E-MAIL**
- Not clear if eFiling complies with statutory requirement; also, cannot assume tribe is an eFiler.
- Notice continues even if tribe does not formally intervene in the case.

## Tribal Intervention

- WICWA provides that an Indian child's Indian custodian or tribe may intervene at any point in any child custody proceeding.
  - § 48.028(3)(e)
- The tribe does not have to be represented by an attorney to intervene or participate in the proceeding.
  - Supreme Court Rule 23.02(2)(n)
- The tribe has a right to examine all documents filed with the court and the records maintained by the county agency.
  - §§ 48.028(4)(c) & 48.981(7)(a)2., 10m., 10r., 11m.

## Transfer of Jurisdiction

Upon the petition of the Indian child's parent, Indian custodian, or Tribe, the circuit court shall transfer the case to the Tribal court except when:

- A parent objects to the transfer,
- The child's Tribe does not have a court,
- The court of the child's tribe declines, or
- The court finds good cause not to transfer.

## Good Cause to Deny Transfer to Tribal Court

The court may find good cause only if person opposing transfer proves one of the following:

1. Child (12 years+) objects to the transfer.
2. Providing evidence or testimony in tribal court would result in undue hardship to parties or witnesses that cannot be mitigated.
3. Tribe received notice as required by WICWA, the tribe has not indicated in writing that it is monitoring the case and may request transfer at a later date, and the tribe's petition to transfer is filed more than 6 months for CHIPS/JIPS cases or 3 months for TPR cases after receiving notice.

☐ Court may not consider any perceived inadequacy of the tribal social services or the tribal court.

## Advisements & Rights

## Advising Unrepresented Parents/Indian Custodian

If parent or Indian custodian appears without counsel, the court must advise him/her of right to:

- Court-appointed counsel
- Request transfer to tribal court
- Object to transfer to tribal court
- Request additional time to prepare for case
- Right to intervene (if not already a party)

Included on ICWA version Notice of Rights and Obligations form (IW-1716).

## Definition of Indian Custodian

Indian custodian means an **Indian person** who has legal custody of an Indian child under applicable Tribal law or custom or under applicable State law, or to whom temporary physical care, custody, and control has been transferred by the parent of such child. An Indian may demonstrate that he or she is an Indian custodian by looking to Tribal law or Tribal custom or State law.

- See § 48.02(8p).

## Legal Representation

- Any indigent parent or Indian custodian shall have the right to court-appointed counsel in a WICWA case - § 48.028(4)(b).
  - Applies to both parents, even if no tribal affiliation.
  - The State Public Defender's Office will appoint if indigent.
- The court has discretion to appoint counsel for any parent in a CHIPS, JIPS, or TPR case.

## Findings

- **Serious Damage**
- Active Efforts
- Placement Preferences

## Serious Damage Finding

- Party seeking to place the Indian child in out-of-home care or to involuntarily terminate parental rights to the Indian child must utilize a qualified expert witness.
- When proving serious damage, evidence must show a **causal relationship** between conditions in the home and likelihood that continued custody of the child will result in serious emotional or physical damage to this child.

## QEW: Order of Preference

- In descending order of preference, qualified expert witnesses are the following:
  - A member of the Indian child's tribe
  - A member of another tribe
  - A professional person
  - A lay person
- Must have knowledge of the Indian child's tribe's family organization and child-rearing practices.

## Qualified Expert Witness Practical Considerations

- QEW testimony is required even when the tribe is in agreement with removal and the out-of-home placement.
- County social worker regularly assigned to the child may not serve as QEW.
- QEW is required for all full, temporary, and limited guardianships under § 48.9795.
  - QEW testimony is not required in § 48.977 guardianships if conducted in underlying CHIPS case.
- QEW may testify to other WICWA findings, but it is only required for the serious damage finding.

## Findings

- Serious Damage
- **Active Efforts**
- Placement Preferences

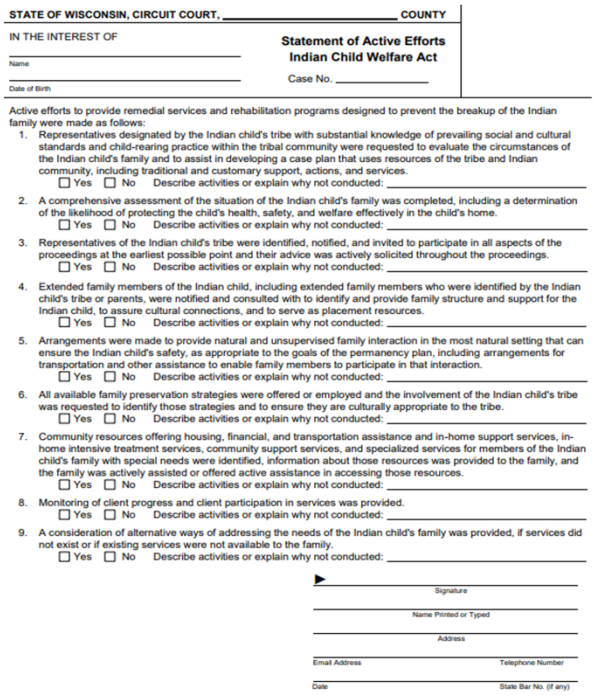
# Active Efforts

The court may not order an Indian child to be removed from the home or involuntarily terminate parental rights unless:

- The court/jury finds that active efforts have been made to provide remedial services and rehabilitation programs designed to prevent the breakup of the Indian child's family and that those efforts have proved unsuccessful.
- Requires an ongoing, vigorous, and concerted level of case work.

See § 48.028(4)(g).

## Statement of Active Efforts (IW-1609)



STATE OF WISCONSIN, CIRCUIT COURT, _____ COUNTY

IN THE INTEREST OF

_____ Name

_____ Date of Birth

**Statement of Active Efforts Indian Child Welfare Act**

Case No. _____

Active efforts to provide remedial services and rehabilitation programs designed to prevent the breakup of the Indian family were made as follows:

1. Representatives designated by the Indian child's tribe with substantial knowledge of prevailing social and cultural standards and child-rearing practice within the tribal community were requested to evaluate the circumstances of the Indian child's family and to assist in developing a case plan that uses resources of the tribe and Indian community, including traditional and customary support, actions, and services.
   ☐ Yes ☐ No Describe activities or explain why not conducted: _____
2. A comprehensive assessment of the situation of the Indian child's family was completed, including a determination of the likelihood of protecting the child's health, safety, and welfare effectively in the child's home.
   ☐ Yes ☐ No Describe activities or explain why not conducted: _____
3. Representatives of the Indian child's tribe were identified, notified, and invited to participate in all aspects of the proceedings at the earliest possible point and their advice was actively solicited throughout the proceedings.
   ☐ Yes ☐ No Describe activities or explain why not conducted: _____
4. Extended family members of the Indian child, including extended family members who were identified by the Indian child's tribe or parents, were notified and consulted with to identify and provide family structure and support for the Indian child, to assure cultural connections, and to serve as placement resources.
   ☐ Yes ☐ No Describe activities or explain why not conducted: _____
5. Arrangements were made to provide natural and unsupervised family interaction in the most natural setting that can ensure the Indian child's safety, as appropriate to the goals of the permanency plan, including arrangements for transportation and other assistance to enable family members to participate in that interaction.
   ☐ Yes ☐ No Describe activities or explain why not conducted: _____
6. All available family preservation strategies were offered or employed and the involvement of the Indian child's tribe was requested to identify those strategies and to ensure they are culturally appropriate to the tribe.
   ☐ Yes ☐ No Describe activities or explain why not conducted: _____
7. Community resources offering housing, financial, and transportation assistance and in-home support services, in-home intensive treatment services, community support services, and specialized services for members of the Indian child's family with special needs were identified, information about those resources was provided to the family, and the family was actively assisted or offered active assistance in accessing those resources.
   ☐ Yes ☐ No Describe activities or explain why not conducted: _____
8. Monitoring of client progress and client participation in services was provided.
   ☐ Yes ☐ No Describe activities or explain why not conducted: _____
9. A consideration of alternative ways of addressing the needs of the Indian child's family was provided, if services did not exist or if existing services were not available to the family.
   ☐ Yes ☐ No Describe activities or explain why not conducted: _____

► _____ Signature

_____ Name Printed or Typed

_____ Address

_____ Email Address Telephone Number

_____ Date State Bar No. (if any)

## Practical Considerations

- If any of the nine activities were not conducted, the person seeking the out-of-home care placement or involuntary TPR must submit documentation to the court explaining why it was not conducted.
- The county/petitioner is responsible for providing active efforts, not the tribe. See DCF's Active Efforts Guide: https://dcf.wisconsin.gov/files/publications/pdf/464.pdf
- WICWA requires that the court **also** make the active efforts finding at Permanency Reviews/Hearings and Extension Hearings.

## Reasonable Efforts vs. Active Efforts

- Two separate standards; occur concurrently.
  - Both required in WICWA case
  - Different goals: Breakup of Indian family vs. Preserving/reunifying the family (or achieving permanency goal)
  - Procedural consequence of failure to prove:
    - Reasonable=Title IV-E federal funding
    - Active=Invalidation of proceedings
  - Exceptions exist for reasonable efforts that do not exist for active efforts

## Determination by Jury

If jury trial requested, the active efforts and serious damage determinations shall be made at the fact-finding hearing by the jury, unless partial summary judgment on the TPR grounds is granted, in which case the judge shall make those determinations at the dispositional hearing.

- See §§ 48.31(1) and (5)
- WICWA Jury Instructions: https://wilawlibrary.gov/jury/

## Burden of Proof

Active Efforts Finding

- Clear & Convincing Evidence

Serious Damage Finding

- CHIPS, JIPS & Guardianship: Clear & Convincing Evidence
- Involuntary TPR: Beyond a Reasonable Doubt
  - Does not change burden of proof for TPR grounds

## Findings

- Serious Damage
- Active Efforts
- **Placement Preferences**

## Placement Preferences: Out-of-Home Care Placements

Preferences for out-of-home care placements:

- An extended family member
- A foster home licensed, approved, or specified by the Indian child's Tribe
- An Indian foster home licensed by another licensing agency
- Group home or RCC approved by an Indian Tribe

*Unless different placement preferences has been established by the child's tribe. Always ask!

## Good Cause to Depart from Placement Preferences: WICWA

- Good cause to depart shall be based on one or more of the following:
  1. Request of parent.
  2. Request of child (if of sufficient age/development).
  3. Extraordinary needs of the child as established by expert witness testimony.
  4. Unavailability of suitable placement after diligent efforts have been made to place in order of preference.
- Length of time in placement does not in itself constitute an extraordinary need.
- County agency must maintain records of efforts made to comply with placement preferences.

## Discover Indian Child After Disposition

How should you proceed if it is discovered that WICWA applies post-disposition through no fault of the parties (e.g., paternity adjudication, change in membership, etc.)?

- ICWA and WICWA do not provide a procedure.
- CCIP has recommended the following:
  - File a Request to Revise the Dispositional Order (IW-1766).
  - Provide registered mail notice at least 10 days prior to the Revision Hearing.
  - Appoint counsel for any indigent parents (refer to SPD Office).
  - At the hearing, take QEW testimony and make WICWA findings.
  - Issue an order with the WICWA findings.

# Voluntary Placement/TPR

## Voluntary Consent

- Consent by parent to TPR or voluntary placement of an Indian child must be:
  - In writing,
  - Recorded before a judge,
  - Accompanied by judge's written certification that terms and consequences were explained and understood, and
  - Include an explanation of the limitations on withdrawing consent.
- Use WICWA forms:
  - Consent to Termination of Parental Rights-Judicial (IW-1637)
  - Voluntary Placement Agreement for an Indian Child (DCF)

# Case Law

## *Adoptive Couple v. Baby Girl* U.S. Supreme Court

See also *Kewaunee County D.H.S. v. R.I.*, 2017AP1697 (Wisconsin Court of Appeals)

- The serious damage finding and active efforts are not required for a parent who has never had legal or physical custody of the child.
- Practice notes:
  - Fact-specific judicial determination.
  - Other provisions of ICWA/WICWA would still apply.
  - Serious damage and active efforts findings would be required for the other parent, even if not Native American.

## *Brackeen v. Haaland*

- U.S. District Court Case from Texas held ICWA & ICWA Regulations violate constitution.
- U.S. Court of Appeals 5th Circuit ultimately found certain provisions of ICWA constitutional and others unconstitutional.
- U.S. Supreme Court found ICWA constitutional.
  - However, did not address Equal Protection challenges (court determined that no party had standing to raise).

## Invalidation

## Invalidation of Action

- An Indian child, parent, Indian custodian, or Tribe may move the court to invalidate an order placing the child in out-of-home care or terminating parental rights on the grounds of a violation of 25 USC 1911, 1912, or 1913.
- If the court finds that grounds exist, the court shall invalidate the order for out-of-home care placement or termination of parental rights.
  - § 48.028(6)

## Legal Resources

- Judicial Checklist - WICWA: www.wicourts.gov/courts/programs/docs/ccipwicwa.pdf
- ICWA circuit court forms: https://www.wicourts.gov/forms1/circuit/formcategory.jsp?Category=21
- CCIP E-Learning Project: www.wicciptraining.com
- DCF Resources (forms, Active Efforts guide, etc.): https://dcf.wisconsin.gov/wicwa

# Additional Resources

- Discover Wisconsin Ho-Chunk Series: https://discoverwisconsin.com/ho-chunk-nation/
- Missing Threads video (enactment of WICWA): www.youtube.com/watch?v=ZCLUbS4FxWo
- This Land Podcast, Season 2 – ICWA Supreme Court Decision: https://crooked.com/podcast-series/this-land/
- Podcast on *Adoptive Couple v. Baby Girl:* https://url.us.m.mimecastprotect.com/s/eiDzCNkRKzFVyqm4S4hoHyOSRV?domain=radiolab.org

# Questions?

**Wisconsin Indian Child Welfare Act (WICWA) Webinar**
**November 21, 2024**

**Biographies**

**Nicole Homer:** Ms. Homer has worked for the Ho-Chunk Nation for 14 ½ years, including as a Judicial Law Clerk, Tribal Attorney/Counsel, and Legislative Attorney. Interspersed in those years, she worked for California Indian Legal Services in Eureka, CA; the Lac Courte Oreilles Band of Lake Superior Ojibwe; Homer Legal, LLC; and Dunn County. She has focused the majority of her career on Federal Indian Law and Social Services matters.

In the summer of 2005, Ms. Homer clerked for the Native American Rights Fund (NARF) in Boulder, CO, where she assisted with "A Practical Guide to the Indian Child Welfare Act." While in undergrad, she had the opportunity to intern for the National Congress of American Indians (NCAI), extern for the Indian Health Service (I.H.S.), and work for a lobbyist dealing solely with Native American tribes.

Ms. Homer has lectured on legal topics relating to the Indian Child Welfare Act, Family Wellness Courts, Drug Courts, and Indian Probate. Additionally, she participates in policy workgroups within the state regarding issues affecting Native American families. She is currently an observer for the Study Committee on Indian Child Welfare Act Issues for the Uniform Law Commission. She finished her term as immediate-past Chair of the Indian Law Section of the State Bar of Wisconsin in 2018 and her term as the Native American Building Bridges Liaison to the State Bar of Wisconsin's Board of Governors in 2022.

Ms. Homer received her J.D. from Loyola Law School (New Orleans, LA) in 2006 and her B.A. in Law & Society from American University (Washington, DC) in 2003. She is an enrolled member of the Oneida of the Thames in Ontario, Canada, although grew up within the traditional lands of the Onondaga Nation in Syracuse, NY.

**Elisabeth (Beth) Stockbridge**: Beth Stockbridge is the Local Attorney Manager in the Shawano office of the Wisconsin State Public Defender (SPD). Beth started as a staff attorney in Green Bay in 2011 and transferred to Shawano in 2018. Throughout her time with the SPD, Beth has specialized in defending youth and parents in CHIPS and TPR actions and has had the privilege of representing hundreds of indigenous youth and families in these cases. Beth graduated from the University of Wisconsin Law School in 2009.

**Christina Tenuta:** Christina Tenuta graduated from the City University of New York School of Law (CUNY) in 2010, where she received the Hon. Bryanne Hamill Family Law Fellowship and the Public Interest Law Fellowship. Prior to joining the Wisconsin Children's Court Improvement Project in 2024, Christina spent ten years in private practice as a family law attorney. For eight years, Christina also served on the Parental Representation Project of Dane County, representing parents in abuse and neglect cases.

Christina is a member of the Family Law Section of the State Bar of Wisconsin, the Dane County Bar Association and on the editorial board of the Wisconsin Journal for Family Law. As a dedicated public interest attorney, she participated in the creation of the Tri-County Foreclosure Mediation Clinic in northeastern Wisconsin and the Senior Wills Clinic in Dane County. Her publications include: Can You Really Be a Good Role Model to Your Child if you Can't Braid Her Hair?: The Unconstitutionality of Factoring Gender and Sexuality into Custody Determinations, 14 N. Y. City Law Rev. (Summer 2012).

# JUDICIAL CHECKLIST – WISCONSIN INDIAN CHILD WELFARE ACT

The Wisconsin Indian Child Welfare Act (WICWA) codifies the federal Indian Child Welfare Act into state statutes. WICWA protects the best interests of Indian children while promoting stability and security of Indian tribes and families. WICWA **applies** to out-of-home placements in CHIPS, status offenses in JIPS, and guardianship cases, TPR proceedings, and pre-adoptive and adoptive placements. WICWA **does not apply** to placements based on delinquent acts or family court proceedings when one of the parents has custody. Additional information on WICWA can be found at: www.wicciptraining.com/ELearningActivities

## APPLICABILITY

An "Indian child" is defined as an unmarried person under the age of 18 who is either:

1) A member of a federally recognized Indian tribe, or
2) The biological child of a member of a tribe **AND** eligible for membership in a tribe.

*There is an ongoing obligation throughout the case to identify an Indian child. Court must instruct parties to inform court if they receive information indicating that there is reason to know the child is Indian child.*

- ❒ Did the court make an inquiry of all case participants, on the record, as to whether the case involves an Indian child? *If there is "reason to know" that the child is an Indian child, proceed as a WICWA case.*
- ❒ Have both parents and any Indian custodian been identified? Has paternity been acknowledged or established? What has been done to locate an absent or missing parent?
- ❒ Is the child a member of a tribe? If not, is either parent a member of or eligible for membership in a tribe? Is the child eligible for membership in a tribe? *Each tribe determines membership.*
- ❒ If the parents are unable to provide information on tribal affiliation, have family members been consulted?
- ❒ Has a Request for Confirmation of Child's Indian Status form been sent to applicable tribe(s)? Has documentation of eligibility for membership been received back from the tribe(s)?

## NOTICE FOR OUT-OF-HOME PLACEMENT AND INVOLUNTARY TERMINATION OF PARENTAL RIGHTS

<u>First Hearing in the Case (excluding Temporary Physical Custody Hearings)</u>

- ❒ Has notice of the proceeding been sent to the tribe, parents, and Indian custodian (if any) by registered mail with return receipt requested?
  - ❒ Have at least 10 days elapsed since **receipt** of the notices? *If no, adjourn hearing.*
  - ❒ Have return receipts been received and filed with the court?
- ❒ If parent or tribe is unknown, was notice sent to Bureau of Indian Affairs at least 15 days prior to hearing?
- ❒ Has a parent, tribe, or Indian custodian requested adjournment to prepare? *If yes, adjourn up to 20 days.*
- ❒ If the parents/Indian custodian do not have counsel, do they want to be represented? Have they contacted the Public Defender's Office? *Right to appointed counsel if indigent.*
- ❒ Have parents been notified of their right to intervene and to request/object to transfer to tribal court?
- ❒ Have parents been notified of potential consequences of case on parental and custodial rights (*form IW-1716*)?

<u>Subsequent Hearings</u>

- ❒ Has tribal contact information (names, addresses, and phone numbers) been documented in the court record for notification of future court proceedings?
- ❒ Has written notice to tribe, parents, and Indian custodian been provided by mail, personal delivery, or fax?
- ❒ Has the tribe received copies of all reports, orders, and other documents submitted to the court?

## INTERVENTION AND TRANSFER OF JURISDICTION

- ❒ Has the tribe or Indian custodian made a motion to intervene? *Right to intervene at any stage.*
- ❒ Is there a request by the tribe, Indian custodian, or parent to transfer the case to tribal court?
- ❒ If transfer requested, the case **shall be** transferred to tribal court **unless one of the following applies**:
  - ❒ Does one of the parents object to the transfer?
  - ❒ Has the tribal court declined jurisdiction or does the tribe lack a tribal court?
  - ❒ Is there good cause under ss. 48.028(3)(c)3. or 938.028(3)(c)3. to deny the transfer?

## PLACEMENT PREFERENCES

The child must be placed according to placement preferences in ss. 48.028(7) or 938.028(6) in any out-of-home, pre-adoptive, or adoptive placement, unless good cause is shown, per ss. 48.028(7)(e) or 938.028(6)(d).

- ❒ Has the tribe established its own order of placement preferences? *If yes, that order applies.*
- ❒ Is the current or proposed placement in compliance with the applicable placement preferences?
- ❒ What efforts have been made to place the child in the order of preference?
- ❒ Have both parents been asked for names of extended family members?
- ❒ Was the tribe contacted for a placement approved, licensed, or operated by the tribe?
- ❒ If placement preferences not followed, is there good cause to depart from order of preference? *Reasons for asserting good cause must be made on the record or provided to court and parties in writing.*

Additional Considerations for Out-of-Home and Pre-adoptive Placements:

- ❒ Is the child's placement the least restrictive, family-like setting that meets the child's special needs, if any?
- ❒ Is the child placed in reasonable proximity to the child's home, taking into account any special needs?

## FINDINGS FOR OUT-OF-HOME PLACEMENT AND INVOLUNTARY TERMINATION OF PARENTAL RIGHTS

Emergency Removal

- ❒ Is emergency removal necessary to prevent imminent physical damage or harm to the child?

Active Efforts to Prevent Breakup of Indian Family*

- ❒ Have all of the required activities under ss. 48.028(4)(g) or 938.028(4)(f) for *active* efforts been conducted?
  - ❒ Were appropriate tribal representatives requested to evaluate the family and assist in developing a case plan that uses resources of the tribe and Indian community?
  - ❒ Has a comprehensive assessment of the family been completed?
  - ❒ Have tribal representatives been identified, notified, and invited to participate in the proceeding?
  - ❒ Have extended family members been consulted for support, cultural connections, and placement?
  - ❒ Were arrangements made to provide family interaction in the most natural and unsupervised setting?
  - ❒ Were all available family preservation strategies offered or employed, while also involving the tribe?
  - ❒ Were community resources offered and the family actively assisted in accessing those resources?
  - ❒ Was monitoring of client progress and participation in services provided?
  - ❒ If services were unavailable, were alternative ways of addressing the family's needs considered?
- ❒ If any activity was not conducted, has documentation been provided to the court with an explanation?
- ❒ Why have the activities and efforts been unsuccessful in reunifying the Indian family?

**Under WICWA, the active efforts finding is also required at Extension and Permanency Hearings.*

Serious Emotional or Physical Damage

- ❒ Has the petitioner provided the requisite qualified expert witness (QEW) testimony?
- ❒ Was the QEW chosen in the order of preference under ss. 48.028(4)(f) or 938.028(4)(e)? If not, what efforts were made to secure a QEW from a higher order of preference?
- ❒ Is the QEW knowledgeable in the tribe's customs and child-rearing practices? In what capacity?
- ❒ Are any of the reasons for the child's removal related to cultural child-rearing practices?
- ❒ Does a causal relationship exist between the conditions in the home and the likelihood that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child, based on the QEW testimony? *Burden of proof of clear and convincing evidence for out-of-home placement and beyond a reasonable doubt for involuntary TPR.*

## VOLUNTARY TPR, VOLUNTARY PLACEMENT AGREEMENT, OR DELEGATION OF POWERS

- ❒ Has the Indian parent or Indian custodian consented in writing?
- ❒ Were the terms and consequences of the consent, including limitation on withdrawing consent, fully explained and understood?
- ❒ Was the consent recorded before a judge and accompanied by the judge's certificate?
- ❒ Is the child at least 11 days old at the time of the consent?
- ❒ Have placement preferences been followed or is there good cause to depart from the order of preference?

**INDIAN CHILD WELFARE ACT (ICWA) CIRCUIT COURT FORMS**

Link to Circuit Court Forms: http://www.wicourts.gov/forms1/circuit/index.htm

| Form # | Form Name |
|---|---|
| IW-1501 | Petition For Appointment of Guardian (Full/Limited/Temporary/Emergency Guardianship) (48.9795, Wis. Stats.) – ICWA |
| IW-1530 | Letters of Guardianship and Dispositional Order Appointing Guardian (Full/Limited/Temporary Guardianship) (48.9795, Wis. Stats.) – ICWA |
| IW-1605 | Petition For Appointment of Guardian (48.977, Wis. Stats.) – ICWA |
| IW-1606 | Dispositional Order Appointing Guardian (48.977, Wis. Stats.) – ICWA |
| IW-1608 | Temporary Physical Custody Request (Chapter 48) – ICWA |
| IW-1609 | Statement of Active Efforts – ICWA |
| IW-1610 | Petition for Protection or Services (Chapter 48) – ICWA |
| IW-1611 T | Dispositional Order - Protection or Services with TPR Notice (Chapter 48) – ICWA |
| IW-1630 | Petition for Termination of Parental Rights – ICWA |
| IW-1633 | Summons - Termination of Parental Rights – ICWA |
| IW-1637 | Consent to Termination of Parental Rights (Judicial) – ICWA |
| IW-1638 | Order Concerning Termination of Parental Rights (Voluntary) – ICWA |
| IW-1639 | Order Concerning Termination of Parental Rights (Involuntary) – ICWA |
| IW-1647 | Order on Petition for Minor Child Adoption – ICWA |
| IW-1649 | Indian Child Adoptee Information – ICWA |
| IW-1700 | Notice of Permanency Hearing – ICWA |
| IW-1711 | Order for Temporary Physical Custody (Secure/Nonsecure) – ICWA |
| IW-1716 | Notice of Rights and Obligations – ICWA |
| IW-1720 | Summons – ICWA |
| IW-1721 | Petition for Protection or Services (Chapter 938) – ICWA |
| IW-1724 | Notice of Hearing (Juvenile) – ICWA |
| IW-1740 | Motion for Transfer to Tribal Court – ICWA |
| IW-1741 | Order on Motion for Transfer to Tribal Court – ICWA |
| IW-1746 T | Dispositional Order - Protection or Services with TPR Notice (Chapter 938) – ICWA |
| IW-1754 | Notice of Change in Placement (Out-of-Home to Out-of-Home/Out-of-Home to In-Home/In-Home to In-Home) – ICWA |
| IW-1766 | Request to Change Placement/Revise Disposition Order – ICWA |
| IW-1783A | Consent to Delegation of Powers under §48.979 of an Indian Child |
| IW-1783B | Certificate to Delegation of Powers under §48.979 of an Indian Child |
| IW-1785A | Stipulation for Consent Decree (Out-of-Home Placement Only) – ICWA |
| IW-1788 | Order for Extension of Disposition Order/Consent Decree (Out-of-Home Placement Only) – ICWA |
| IW-1788 T | Order for Extension of Disposition Order/Consent Decree with TPR Notice (Out-of-Home Placement Only) – ICWA |
| IW-1789 T | Order for Change in Placement with TPR Notice (In-Home to Out-of-Home Placement Only) – ICWA |
| IW-1790 T | Order for Change in Placement with TPR Notice (Out-of-Home to Out-of-Home Placement Only) – ICWA |
| IW-1791 | Permanency Hearing Order – ICWA |
| IW-1791 T | Permanency Hearing Order with TPR Notice – ICWA |